Court of Appeals No. 39130-9-II
Thurston County No. 08-1-00761-1

STATE OF WASHINGTON,

Respondent,

vs.

TEMICA TAMEZ

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

A. ASSIGNMENTS OF ERROR

I. THE COURT GAVE AN ERRONEOUS ACCOMPLICE LIABILITY INSTRUCTION.

II. MS. TAMEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MS. TAMEZ'S CONVICTION FOR TAMPERING WITH A WITNESS.

IV. MS. TAMEZ WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. MS. TAMEZ WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONVICT MS. TAMEZ AS AN ACCOMPLICE IF IT FOUND SHE ACTED WITH KNOWLEDGE THAT HER ACTIONS WOULD PROMOTE OR FACILITATE *ANY* CRIME, AND THAT IT COULD CONVICT MS. TAMEZ AS AN ACCOMPLICE IF SHE AIDED OR AGREED TO AID ANOTHER PERSON IN PLANNING OR COMMITTING *ANY* CRIME. AS A RESULT, HER CONVICTION FOR TAMPERING WITH A WITNESS SHOULD BE REVERSED.

II. MS. TAMEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, AND HER CONVICTION FOR TAMPERING WITH A WITNESS SHOULD BE REVERSED, WHERE HER ATTORNEY FAILED TO OBJECT TO THE COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON ACCOMPLICE LIABILITY, FAILED TO OBJECT TO THE REPEATED ADMISSION OF HEARSAY AND ITS USE AS SUBSTANTIVE EVIDENCE, FAILED TO OBJECT TO THE ADMISSION OF MS. TAMEZ'S STATEMENTS ABOUT THREATENING MS. KRUSE BECAUSE THE STATE FAILED TO

ESTABLISH THE CORPUS DELECTI OF THE CRIME, AND FAILED TO SEEK DISMISSAL OF THE CHARGE DUE TO THE STATE'S FAILURE TO ESTABLISH THE CORPUS DELECTI OF THE CRIME AND FAILURE TO PRESENT SUFFICIENT EVIDENCE ON THAT CHARGE.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MS. TAMEZ TAMPERED WITH A WITNESS.

IV. MS. TAMEZ WAS DENIED A FAIR TRIAL ON COUNT 2, TAMPERING WITH PHYSICAL EVIDENCE AND COUNT 3, MONEY LAUNDERING, WHERE THE STATE COMMITTED MISCONDUCT BY ELICITING TESTIMONY FROM A WITNESS ON THE ULTIMATE ISSUE OF MS. TAMEZ'S GUILT.

C. STATEMENT OF THE CASE

1. FACTUAL HISTORY

Temica Tamez was involved in a dating relationship with Damien Harris. RP II, p. 40. On April 18th, 2008 Damien Harris and his friend Michael Boyer were arrested after engaging in a drug deal involving crack cocaine at a Texaco station in Thurston County. RP II, p. 152-53, 155. On April 18th, 2008 detectives from the Thurston County Narcotics Task Force conducted a drug buy with Damien Harris using a confidential informant and he was subsequently arrested, along with his accomplice Michael Boyer. RP II, p. 50-57.

Michael Boyer cut a deal with the State to testify against Ms. Tamez and Mr. Harris, as well as others. RP III, p. 145. He testified that

he and Mr. Harris were friends and business associates who dealt crack cocaine. RP III, p. 145-46. Adrian Morris was another of Harris and Boyer's associates. RP III, p. 151. Adrian went by the name "C" or "C-Rag." RP II, p. 84. Boyer testified that during the period between October and November of 2007 Ms. Tamez and Mr. Harris were living together and he thought Ms. Tamez had been present a couple of times when Mr. Harris was preparing for a drug deal. RP III, p. 150.

Boyer testified that Mr. Harris had an apartment that served as a "hideout" where he kept most of his things and where he could go. RP III, p. 156. Cathy Kruse was the renter of this apartment and she allowed Mr. Harris to use it in exchange for drugs. RP III, p. 221-22. According to Boyer, he had to keep his things at an alternate location because didn't want his property to be seized by DOC in a search. RP III, p. 157.

According to Boyer, Ms. Tamez was aware of the apartment and its location. RP III, p. 161. The prosecutor asked Boyer, without objection, whether Ms. Tamez knew that Mr. Harris sold drugs and Boyer answered that she "can't really not know." RP III, p. 161. He based this on the fact that he and Mr. Harris were prolific drug dealers and his own girlfriend was aware of his illegal activities. RP III, p. 161. Ms. Tamez, however, was never present for or involved in any drug transactions, nor

did she ever have any conversation with Boyer indicating she was aware of the drug dealing. RP III, p. 161-62.

After their arrest Boyer told Tamez about a safe deposit box containing money belonging to him and Mr. Harris because Ms. Tamez was trying to find money to bail Mr. Harris out of jail. RP III, p. 162-63. He didn't tell Ms. Tamez how much money was there as he claimed not to have that information himself. RP III, p. 163. Boyer conceded that he didn't actually know whether Ms. Tamez was aware of what was going on during the times that he claimed she was present for drug deals, and it was possible she didn't. RP III, p. 168. He testified that Mr. Harris would not have dealt drugs in front of Ms. Tamez because he would not have wanted to put her in jeopardy and that he deliberately kept her out of the loop. RP III, p. 170-71. When asked whether it was true that Ms. Tamez didn't know what Mr. Harris did for a living Boyer conceded "I could only speculate." RP III, p. 171.

Cathy Kruse testified that after his arrest, she spoke with Mr. Harris on the phone and he told her not to let anyone into the apartment except Ms. Tamez, who he was sending over to pick up some personal effects. RP III, p. 225. Ms. Tamez went to Ms. Kruse's apartment and retrieved $2400 in cash as well as some of Mr. Harris' personal possessions. RP III, p. 228. At a later time Ms. Tamez went back to Ms.

Kruse's apartment to retrieve the rest of Mr. Harris' things, because she couldn't do it all in one trip. RP III, p. 228-29. The prosecutor asked Ms. Kruse if she recalled Ms. Tamez making any threats against her and she denied that Ms. Tamez ever threatened her. RP III, p. 230, 241. The prosecutor asked Ms. Kruse if Ms. Tamez ever talked to her about whether she should speak to the police and Ms. Kruse could not recall any such conversation. RP III, p. 231. Contrary to Boyer's testimony, Ms. Kruse testified that Ms. Tamez had never been to the apartment before and that she had to give her directions on how to find it. RP III, p. 237-38. Ms. Kruse testified that at one point she received a phone call from Mr. Harris and she heard Ms. Tamez in the background raising her voice in such a way that she seemed upset. RP III, p. 241. Ms. Kruse warned Mr. Harris that she would not allow Ms. Tamez in the apartment if she was upset. RP III, p. 241. She reiterated, however, that she had not been threatened in any way or subjected to assaultive conduct from Ms. Tamez. RP III, p. 241.

The Thurston County Jail recorded all of the phone calls Mr. Harris made after his arrest. RP II, p. 70. There were many people speaking on these phone calls beyond the only party-opponent in this trial, Ms. Tamez. See transcript of Taped Jail Phone Calls. Defense counsel did not object, at any point, to the hearsay within these phone calls. Id.

The prosecutor played six phone calls for the jury. Mr. Harris made the first phone call to a man by the name of Rob Bennett. See Transcript of Phone Calls, p. 2. Mr. Harris asked Rob to use another phone belonging to "Joey" to call C-Rag. Id. at p. 3. Rob Bennett purportedly reached C-Rag and then acted as a go-between between Mr. Harris and C-Rag, speaking to each of them on separate phones. Id. at 4. Harris asked C-Rag, through Bennett, whether he had gone to the "spot" and Bennett said that C-Rag said that he had, but that Cathy Kruse had refused to let him in. Id. at 5. Bennett said that C-Rag said that he (C-Rag) tried to kick the door open in response. Id. at 5. Harris wanted to know whether the police had searched the apartment and Bennett said that C-Rag said he didn't know. Id. at 7-8. Harris then told Bennett to end the call with C-Rag and instructed him to call Cathy Kruse, which he did. Id. at 10-11. Bennett performed the same service, talking to Kruse on one phone and Harris on the other. Id. at 11. Harris asked Bennett to ask her whether the police found anything at the apartment, and Bennett said that Cathy said she refused to let them in. Id. at 12. Cathy, evidently, was confused and was actually talking about C-Rag, according the hearsay from Bennett. Id. at 12-13. Later in the call Bennett said that Cathy said that the police had, in fact, been there but she refused to let them in. Id. at 14. Harris had Bennett instruct Cathy to go look in his coat pocket and report what she

found. Id. at 14-15. Bennett said that Cathy said she found money and baggies. Id. at 16. Harris told Bennett to tell her to get rid of the drugs and to keep the money as he would need it for bail. Id. at 16-17. Harris also relayed that C-Rag would coming over for the money. Id. at 18.

The second call was between Michael Boyer and a person named Cassie Simmons. Id. at 20. Boyer asked Cassie, his girlfriend, to go to the "spot" and retrieve the money from Cathy Kruse. Id. at 21. Mr. Harris got on the phone and told Cassie to tell Cathy to get rid of the drugs in any way she saw fit. Id. at 22. Harris told Cassie to have Temica come and bail them out after retrieving the money. Id. at 22. Harris also told Cassie to take C-Rag with her when she went to the spot. Id. at 23.

The third call was a three-way call between Boyer, Harris, and Ms. Tamez. Ms. Tamez spontaneously stated that she had gone to the spot, but prior to going there she discovered that Ms. Kruse had thrown all of Mr. Harris' belongings outside. Id. at 44. Ms. Tamez boasted that Kruse had picked it all up and brought it back inside because she (Tamez) had threatened to "beat the sh-t out of her." Id. at 44. Ultimately Ms. Kruse gave Ms. Tamez the money Mr. Harris wanted. Id. at 44. While there, Ms. Tamez chastised Kruse for her rudeness in putting someone's belongings outside. Id. at 45. Ms. Tamez said: "And she was like well, uh, I'm just stressed out, and D told me not to give anybody anything. I

was like I don't give a fuck. You don't throw people's shit outside. She was like well, C threatened my life. I don't fucking care what he did." Id. at 45. Again, defense counsel did not object to the hearsay attributed to Ms. Kruse in this call. Id.

The fourth call was between Ms. Tamez and Mr. Harris. Id. at 57. During the call, Ms. Tamez expresses frustration at the difficulty in obtaining Mr. Harris' property from Ms. Kruse's apartment. Id. at 59. Mr. Harris instructed Ms. Tamez to "Just get my stuff out of there." Id. at 59. Ms. Tamez replies:

> She won't let anybody in the door. You don't understand. He literally tried to kick the door off the hinges, and that's when he was like Temica, go beat her up right now. She—they won't come out. The old broad started crying on the phone with me and hung up on me, and then I called back and I was like look, I'm outside of your house and I ain't playing this shit. She was like Rick's gonna come out right now. D said to take his, for me to keep his stuff and dispose of it. I was like I don't—f*ck it. I don't know what the f*ck is going on.

Id. at 59.

Mr. Harris then told Ms. Tamez to call Ms. Kruse and Ms. Tamez dialed her up and Mr. Harris left a voice mail, stating:

> Hey, what up? It's me. It's D, man. I'm in jail. Hey, let C and Temica and them come by and get my stuff. They can grab all the stuff. You can just keep whatever you, whatever, but my stuff, the TV, clothes and all that, let her get all that. Don't throw it outside. Let them come get it. They'll come and get it, so answer your phone. All right.

Id. at 60. Nothing in the remainder of the phone conversations involved discussion of Ms. Kruse or the disposition of the items at her apartment. See Transcript of Phone Calls.

During closing argument the prosecutor treated the notion that C-Rag had tried to kick in Ms. Kruse's door as substantive evidence. RP IV, p. 370. The prosecutor argued that C-Rag had threatened Ms. Kruse's life based not on Ms. Kruse's testimony, but on the hearsay statement attributed to Ms. Kruse by Ms. Tamez. RP IV, p. 370. The prosecutor further argued that Ms. Tamez acted as an accomplice in that act and that this act of trying to retrieve Mr. Harris' property constituted tampering with a witness. RP IV, p. 351-360, 368-70. The prosecutor further argued that Ms. Tamez was guilty of tampering with a witness based on her statement to Mr. Harris that she had threatened to beat the sh-t out of Ms. Kruse because she had placed Mr. Harris' property outside. RP IV, p. 370-71. The prosecutor argued that Ms. Tamez tampered with physical evidence based on her retrieval of Mr. Harris' bail money and personal property from Ms. Kruse's apartment. RP IV, p. 369-70.

2. PROCEDURAL HISTORY

By Second Amended Information, the Thurston County Prosecutor charged Temica Tamez with tampering with physical evidence (Count II), two counts of money laundering (Counts III and IV), and tampering with a

witness (Count V). CP 1-2. She was convicted of these counts. CP 33-36. She was given a standard range sentence. CP 40. She filed this timely appeal. CP 46.

D. ARGUMENT

I. MS. TAMEZ WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONVICT MS. TAMEZ AS AN ACCOMPLICE IF IT FOUND SHE ACTED WITH KNOWLEDGE THAT HER ACTIONS WOULD PROMOTE OR FACILITATE *ANY* CRIME, AND THAT IT COULD CONVICT MS. TAMEZ AS AN ACCOMPLICE IF SHE AIDED OR AGREED TO AID ANOTHER PERSON IN PLANNING OR COMMITTING *ANY* CRIME. AS A RESULT, HER CONVICTION FOR TAMPERING WITH A WITNESS SHOULD BE REVERSED.

The State relied, at least in part, on an accomplice theory of liability to support its contention that Ms. Tamez was guilty of tampering with a witness. Specifically, the State maintained that Ms. Tamez was an accomplice to C-Rag when he supposedly tried to kick in Ms. Kruse's door to retrieve Mr. Harris' property and money. The State further argued that Ms. Tamez was an accomplice, if not a principal, in both counts of money laundering.

The trial court's written instruction on accomplice liability said the following:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is

legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of *the* crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing *the* crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 15 (Instruction No. 11).

However, when orally reciting the accomplice liability instruction the court said:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of *a* crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing *a* crime.

The word "aid" means all assistance, whether given by words, acts encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of a crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime, whether present at the scene or not.

RP IV, p. 335-36.

An individual is guilty as an accomplice if "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020 (3) (a). An individual aids or agrees to aid if he is "ready to assist" in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981), citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Prior to *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (as amended) (2001), the law on accomplice liability as interpreted in Washington followed the principle of "in for a dime, in for a dollar." In *Roberts*, the Washington Supreme Court repudiated this and held that in order to be convicted as an accomplice, the State must prove that the actor who is alleged to be the accomplice must have knowledge of

the specific crime the principal intends to commit, not merely "a crime" the principal intends to commit. *Roberts* at 735-36; *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). The instruction number 7 in *Roberts* read as follows:

> You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*.

Roberts at 735. Since *Roberts*, the accomplice liability instruction has been changed to read:

> [You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime.*]
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of *the* crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit *the* crime; or
>
> (2) aids or agrees to aid another person in planning or committing *the* crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

> [A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.]

WPIC 10.50.

The revisions to the accomplice instruction were necessary to reflect the fact that an accomplice must act with knowledge of the specific crime that is eventually charged, rather than knowledge of a different crime or generalized knowledge of criminal activity. The instruction must be framed in terms of "the" crime rather than knowledge of "a" crime. *State v. Carter*, 154 Wn.2d 71, 109 P.3d 823 (2005); *Roberts* at 510-13; *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Moran*, 119 Wn.App. 197, 209-10, 81 P.3d 122 (2003), *review denied* 151 Wn.2d 1032, 95 P.3d 351 (2004).

Here, although the written instruction was correct, the court's oral recitation of the instruction was erroneous in that it allowed the jury to convict Ms. Tamez of tampering with a witness, as an accomplice, if it found she had knowledge of *any* crime C-Rag intended to commit against Ms. Kruse, not solely tampering with a witness.

A trial court is required to read the written jury instructions aloud to the jury, and the oral recitation must be accurate. CrR 6.15 (d) expressly requires the court to read the instructions to the jury. A trial court errs if it fails to read an instruction to the jury. *State v. Sanchez*, 94

P.3d 579, 589, 94 P.3d 384 (2004). The presumption that a jury follows the instructions of the court will not cure the failure to read an instruction to the jury. *Sanchez* at 590. A trial court's failure to read an instruction is analogous to giving an ambiguous, erroneous, or misleading instruction. *Sanchez* at 590; *Ho v. Carey*, 332 F.3d 587, 593-94 (9th Cir., 2003). In *Ho*, as in here, the trial court gave an erroneous recitation of a jury instruction to the jury and failed to correct the error. *Ho* at 592-93.

That the oral instruction given by the trial court was flatly erroneous cannot credibly be disputed. The court effectively changed the accomplice liability instruction back to the pre-*Roberts*, "in for a dime, in for a dollar" principle of accomplice liability. The only remaining question is whether this error requires reversal.

The *Ho* Court held that because the instruction given was "flatly erroneous," it need not even engage in the question of whether the error rose to the level of constitutional error and presumed that constitutional error occurred. *Ho* at 592. The Court further held that the error was not harmless stating "[i]t has 'long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.'" *Ho* at 595. In Ms. Tamez's case, the State argued two theories it believed established Ms. Tamez's guilt on the charge of tampering with a witness: That she acted

as a principal when she allegedly threatened to beat Ms. Kruse, and that she acted as an accomplice to C-Rag when he allegedly tried to kick in Ms. Kruse's door. Applying the reasoning set forth by the Ninth Circuit in *Ho*, the error in Ms. Tamez's case cannot be considered harmless. The person referenced as C-Rag arguably committed at least four crimes other than the one charged.

By supposedly trying to kick in Ms. Kruse's door,[1] the State could have charged harassment, attempted criminal trespass or perhaps attempted burglary, or attempted malicious mischief, to name a few crimes. By relying on an accomplice theory of liability to establish Ms. Tamez's guilt on the charge of tampering with a witness, the court's instruction relieved the State of its burden of proving that Ms. Tamez acted with knowledge that C-Rag would commit the specific crime of tampering with a witness.

Sanchez requires the same result. This error is manifest error affecting a constitutional right under RAP 2.5 because the trial court's oral instruction relieved the State of its burden to prove that Ms. Tamez acted with knowledge of the actual crime that was eventually charged as opposed to the numerous other crimes she could have believed C-Rag

[1] It is impossible to treat this allegation as fact. The only witness who could have confirmed this act was Ms. Kruse, and she failed to do so. The only evidence of this act was the hearsay attributed to Ms. Kruse by Ms. Tamez, which should have been, but was not, objected to by defense counsel.

intended to commit when he supposedly tried to break into Ms. Kruse's apartment. Because the court's oral instruction relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt, this error requires reversal and Ms. Tamez should be granted a new trial.

II. MS. TAMEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, AND HER CONVICTION FOR TAMPERING WITH A WITNESS SHOULD BE REVERSED, WHERE HER ATTORNEY FAILED TO OBJECT TO THE COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON ACCOMPLICE LIABILITY, FAILED TO OBJECT TO THE REPEATED ADMISSION OF HEARSAY AND ITS USE AS SUBSTANTIVE EVIDENCE, FAILED TO OBJECT TO THE ADMISSION OF MS. TAMEZ'S STATEMENTS ABOUT THREATENING MS. KRUSE BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELECTI OF THE CRIME, AND FAILED TO SEEK DISMISSAL OF THE CHARGE DUE TO THE STATE'S FAILURE TO ESTABLISH THE CORPUS DELECTI OF THE CRIME AND FAILURE TO PRESENT SUFFICIENT EVIDENCE ON THAT CHARGE.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127

Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

a. Failure to object to erroneous accomplice liability instruction.

For the reasons set forth in Part I, the trial court erred in giving an erroneous accomplice liability instruction and defense counsel erred in failing to object and request the court give the proper accomplice instruction. In all likelihood, defense counsel, like the prosecutor, wasn't listening when the court read the instruction. Be that as it may, defense counsel had a duty to identify the court's error and seek its immediate correction. The failure to do so was unreasonable, in that there was no legitimate tactical reason for allowing the jury to be instructed that Ms. Tamez was in for a dime, in for a dollar to all of the crimes committed by C-Rag when he supposedly tried to kick in Ms. Kruse's door. Further, this

error prejudiced Ms. Tamez because, as noted above, it relieved the State of its burden to prove every essential element of the crime charged. Ms. Tamez received ineffective assistance of counsel.

b. Failure to object to hearsay

The State, without any objection from defense counsel, played several phone conversations for the jury which were replete with inadmissible hearsay. Indeed, the evidence would have been insufficient to prove each of the crimes charged without these tapes. The first phone call contained single and double hearsay throughout. None of the people on the first phone call, Rob Bennett, Damien Harris, Adrian Morris (a.k.a. C-Rag) and Cathy Kruse, were party opponents.

The only evidence that C-Rag tried to kick in Ms. Kruse's door, or threaten her life was the statement supposedly made by the non-testifying C-Rag to the non-testifying, unidentified "Robert Bennett" on the telephone, and the statement allegedly made by Cathy Kruse to Ms. Tamez, which Ms. Tamez then relayed to Mr. Harris on the telephone. Each of these statements was hearsay and none of them were objected to by defense counsel. Because these statements, along with Ms. Tamez's statement which should not have been admitted because of the State's failure to establish the corpus delecti (see part C, below), provided the *sole* evidence against Ms. Tamez on the charge of tampering with a witness,

defense counsel was incompetent in failing to object to the admission of these statements and Ms. Tamez was prejudiced by defense counsel's unprofessional error.

> "To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison,* 53 Wash.App. 754, 763, 770 P.2d 662 (1989). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Davis,* 154 Wn.2d at 714 (quoting *State v. McNeal,* 145 Wash.2d 352, 362, 37 P.3d 280 (2002)).

State v. Johnston, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007).

Here, failing to object to inadmissible hearsay which provided the sole proof of the charge unquestionably fell below prevailing professional norms. Presuming the trial court is aware of the hearsay rule and takes his duty to follow the law and afford the defendant a fair trial seriously, which appellant certainly assumes, the objection to the hearsay would have been sustained. Last, the verdict on the charge of tampering with a witness would have different because without these hearsay statements, coupled with Ms. Tamez's inadmissible "confession" to threatening to beat Ms. Tamez, there was *no* proof of this charge. Cathy Kruse, the supposed object of the witness tampering allegation, did not testify this occurred.

Ms. Tamez was denied effective assistance of counsel and should be granted a new trial.

c. Failure to object to Ms. Tamez's statement that she threatened to "beat" Ms. Kruse's "ass" where the State failed to prove the corpus delecti of the crime.

The confession or admission of a defendant charged with a crime cannot be used to prove a defendant's guilt in the absence of independent evidence corroborating that confession or admission. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The State has the burden of producing evidence sufficient to satisfy the corpus delecti rule. *State v. Riley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993). If sufficient evidence exists, the confession or admission of a defendant may be considered along with independent evidence to establish a defendant's guilt. *Aten* at 656.

To be sufficient, independent corroborative evidence need not establish the corpus delecti beyond a reasonable doubt, or even by a preponderance of the evidence. *Riley* at 32. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delecti. *State v. Smith*, 115 Wn.2d 775, 781, 901 P.2d 975 (1990). Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. *Aten* at 656; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). In

determining whether the State has produced sufficient prima facie evidence, the appellate court assumes the truth of the State's evidence and all reasonable inferences therefrom. *Bremerton v. Corbett*, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); *State v. Pineda*, 99 Wn.App. 65, 77-78, 992 P.2d 525 (2000). But the independent evidence must support a logical and reasonable inference of criminal activity only. *Aten* at 659-60. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delecti. *Id.*

It has been held that the corpus delecti rule "is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make a proper objection to the trial court to preserve the issue. *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 521 (1996); *State v. C.D.W.*, 76 Wn.App. 761, 763-64, 887 P.2d 911 (1995). Because defense counsel did not render an objection, Ms. Tamez argues that the elements of ineffective assistance of counsel have been met.

Here. There were was only one piece of "evidence," beyond Ms. Tamez's statement about C-Rag supposedly trying to kick in Ms. Kruse's door was the hearsay by the non-testifying C-Rag contained within the hearsay from the non-testifying Robert Bennett. As noted above, this "statement" should never have been put before the jury or treated as

substantive evidence. Thus, there was no competent evidence that anyone tried to kick in Ms. Kruse's door beyond Ms. Tamez's own statement to that effect. Further, even if the statement supposedly made by C-Rag about trying to kick in Ms. Kruse's door was admissible as substantive evidence, the statement is not prima facie evidence of the crime of tampering with a witness. The statement is an admission that C-Rag tried to kick in the door to gain entry in to the apartment, and does not in any way relate to an attempt induce a witness to testify falsely or withhold testimony or information relevant to a criminal investigation from a law enforcement agency. Nothing in C-Rag's alleged statement (or in Ms. Tamez's statement, for that matter) evidences an intent to tamper with Ms. Kruse as a witness in a criminal case. The State failed to establish the corpus delecti of the crime of tampering with a witness prior to the admission of Ms. Tamez's statement, and Ms. Tamez's attorney was ineffective for failing to object on that basis.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MS. TAMEZ TAMPERED WITH A WITNESS.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a

claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

In *State v. Rempel*, 114 Wn.2d 77, 785 P.2d 1134 (1990), the Washington State Supreme Court considered the question of sufficiency of the evidence on a conviction for tampering with a witness. In that case, the defendant had been accused of attempting to rape an acquaintance and he called her two or three times from the county jail in the days following his arrest. *Rempel* at 81-82. During the phone conversations the defendant apologized to the victim, told her the charges would ruin his life and asked her to drop the charges. *Rempel* at 82. He said these things in

at least two phone conversations. *Id.* The victim testified that she was not affected in any way by what the defendant said beyond finding it to be a nuisance. *Id.* at 82. The Court, troubled by the fact that these brief comments comprised the sole evidence supporting the conviction, found the evidence insufficient. *Rempel* at 83. The Court stated:

> The sum of the defendant's attempts are an apology, a statement that "it" was going to ruin his life, and a request that DuBois "drop the charges." The literal words do not contain a request to withhold testimony. The defendant's words contain no express threat nor any promise of reward.

Rempel at 83. The Court noted: "...[A]n attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used. The State is entitled to rely on the inferential meaning of the words and the context in which they were used." *Rempel* at 83-84, citing *State v. Scherck,* 9 Wn.App. 792, 514 P.2d 1393 (1973). The witnesses' reaction to the attempted inducement, the Court noted, is not dispositive. *Rempel* at 84. In *Rempel*, however, the witnesses' reaction was relevant because it tended to disprove the State's assertion that in the context in which the words were spoken (the context being a potential rapist speaking to his potential rape victim), the defendant's words constituted an attempt to induce the witness. *Id.*

Here, the evidence that Ms. Tamez tampered with Ms. Kruse as a witness is far less compelling than that offered in *Rempel*. Here, there

were no words spoken to Ms. Kruse by C-Rag, and his stated reason for kicking the door, as conveyed by Robert Bennett, was to gain entry to retrieve property. His stated purpose had nothing to do with inducing or attempting to induce Cathy Kruse to give false testimony, to withhold testimony or withhold relevant information from a law enforcement agency.

Similarly, Ms. Tamez's inadmissible statement that she threatened to beat up Ms. Kruse related to Ms. Kruse having put Mr. Harris' possessions outside and Ms. Tamez's resultant anger about what she perceived to be a lack of respect for Mr. Harris' property. There was no comment of any kind during this exchange about Ms. Kruse testifying or withholding information from law enforcement. More importantly, Ms. Kruse did not testify about any of this. Ms. Kruse denied that she was threatened by Ms. Tamez and denied that she was subjected to any assaultive conduct. Ms. Kruse's testimony was wholly inconsistent with a finding that Ms. Tamez, either acting as a principal or as an accomplice to C-Rag, tampered with Ms. Kruse as a witness. The evidence is insufficient to sustain the conviction and Ms. Tamez's conviction for tampering with a witness should be reversed and dismissed.

IV. MS. TAMEZ WAS DENIED A FAIR TRIAL ON COUNT 2, TAMPERING WITH PHYSICAL EVIDENCE AND COUNT 3, MONEY LAUNDERING, WHERE THE STATE

COMMITTED MISCONDUCT BY ELICITING TESTIMONY FROM A WITNESS ON THE ULTIMATE ISSUE OF MS. TAMEZ'S GUILT.

The State needed to prove, in order to establish Ms. Tamez's guilt on the charge of tampering with physical evidence and the first count of money laundering (Count 3, alleged to have occurred on April 18, 2008) that Ms. Tamez knew that Mr. Harris made his living dealing drugs. Ms. Tamez needed to know that Mr. Harris was a drug dealer in order to know that the money she retrieved from Ms. Kruse was the proceeds of drug sales (Count 3), and in order to know that the property she retrieved for Mr. Harris was purchased with drug money (Count 2), as the State alleged. To prove this point, the prosecutor asked Boyer, without objection, whether Ms. Tamez knew that Mr. Harris sold drugs and Boyer answered that she "can't really not know." RP III, p. 161. This was flagrant prosecutorial misconduct. The State may not ask a witness to testify about what someone else knows, when there is no basis for that knowledge beyond suspicion or assumption. See *State v. Jones,* 117 Wn.App. 89, 68 P.3d 1153 (2003). Mr. Boyer's testimony deprived Ms. Tamez of her right to have the jury decide whether she had knowledge of Mr. Harris' occupation prior to going to Ms. Kruse's apartment on April 18th. Although counsel did not object to this improper testimony, it is well

settled that prosecutorial misconduct which is so flagrant and ill-intentioned that it could not be remedied by a curative instruction may provide grounds for reversal in the absence of an objection. *State v. Boehning*, 111 P.3d 899, 903 (2005); *Jones* at 90-91; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). Here, Mr. Boyer's "insider" knowledge about what Ms. Tamez must have known, by virtue of her status as Mr. Harris' girlfriend, was irretrievably prejudicial to her ability to receive a fair trial. Ms. Tamez should be granted a new trial on counts 2 and 3, tampering with physical evidence and money laundering.

E. CONCLUSION

Ms. Tamez's conviction for tampering with a witness should be reversed due to insufficient evidence. Alternatively, Ms. Tamez should be granted a new trial on that count because she received ineffective assistance of counsel. Ms. Tamez's convictions for tampering with physical evidence and money laundering under count 3 should be reversed and she should be granted a new trial.

RESPECTFULLY SUBMITTED this 12th day of April, 2010.

ANNE M. CRUSER, WSBA #27944
Attorney for Ms. Tamez

CERTIFICATE OF MAILING

I certify that on 04/12/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Carol LaVerne, Thurston County Prosecutor's Office, 2000 Lakeridge Dr. S.W., WA 98502; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Temica Tamez, General Delivery, Olympia, WA 98502.

Anne M. Cruser

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